

DNA Exonerations and the Elusive Promise of Criminal Justice Reform

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WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed ed., Cambridge University Press 2017)

DNA exonerations have dramatically changed the conversation about the accuracy of the criminal justice system. Fifty years ago, the widely shared view was that the system ensured no innocent defendants would be convicted. As Judge Learned Hand famously complained, criminal procedure “has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”¹ But hundreds of DNA exonerations upended that conventional wisdom. They demonstrated that juries have repeatedly found innocent defendants guilty. If we have, on hundreds of occasions, convicted innocent people, then how do we correct those errors and how do we change the criminal justice system to avoid future wrongful convictions?

These important questions are taken up in *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*,² a nineteen-chapter volume, edited by Daniel S. Medwed. The book explores the lessons we have learned in the twenty-five years since DNA first exonerated a wrongfully convicted defendant, and it identifies several challenges that still remain. The book covers a wide array of topics, and it includes chapters from an all-star team of authors. This breadth and expertise make the volume a good introduction to the reader who is unfamiliar with DNA exonerations, and it could easily serve as a textbook for a seminar on the topic.

Wrongful Convictions and the DNA Revolution offers significant detail about the specific types of errors that resulted in the conviction of innocent defendants. Those errors include flawed eyewitness identification procedures, coercive and suggestive interrogation practices, overzealousness on the part of prosecutors, and

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¹ United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

² WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed ed., 2017) [hereinafter WRONGFUL CONVICTIONS AND THE DNA REVOLUTION].

poor lawyering by defense attorneys.³ In addition to these specific errors, the volume also gives great insight into the structural flaws that allowed these errors to accumulate and persist, such as the incentives for prosecutors to win cases,⁴ the incentives for innocent defendants to accept plea bargains,⁵ the massive caseloads and chronic underfunding of the criminal justice system,⁶ the decentralized nature of the system,⁷ and the limitations of constitutional litigation for changing the basic arrangement of how law enforcement and civilians interact.⁸

Because the volume includes chapters from multiple authors, it provides different perspectives on important issues. For example, one question that divides the field is how to define the term “exoneration.”⁹ Should the term be reserved for only those individuals whose innocence have been proven by incontrovertible DNA evidence? Or are those whose convictions have been erased “by a governor, prosecutor, judge, or jury based on some new evidence of factual innocence” also correctly classified as “exonerated”?¹⁰ The volume presents these opposing views, and the reader is better served by having both represented.

The presentation of opposing views is not limited to how broadly to define exoneration. The volume also contains a chapter from Paul Cassell, which asks difficult questions about the tradeoffs associated with changing the criminal justice system to make wrongful convictions less likely.¹¹ All changes to the criminal justice system, including changes that could prevent wrongful convictions, will involve tradeoffs. For example, changing interrogation techniques to put less pressure on suspects may reduce the number of innocent defendants who falsely confess to crimes they did not commit. But it may also reduce the number of guilty defendants who confess as well.¹² While most of the book’s authors appear

³ These are the factors that are most often correlated with a wrongful conviction. See Brandon L. Garrett, *Convicting the Innocent Redux*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 40, 45–46.

⁴ George C. Thomas III, *Prosecutors: The Thin Last Line Protecting the Innocents*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 208, 210.

⁵ *Id.* at 210.

⁶ Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 85, 95.

⁷ Michael Meltsner, *Innocence Before DNA*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 14, 15.

⁸ See *id.*

⁹ See Daniel S. Medwed, *Talking About a Revolution: A Quarter Century of DNA Exonerations*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 2, 3 (“This book takes no universal stance on the most appropriate and precise definition of exoneration.”).

¹⁰ Richard A. Leo, *Has the Innocence Movement Become an Exoneration Movement? The Risks and Rewards of Redefining Innocence*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 57, 60.

¹¹ Paul G. Cassell, *Can We Protect the Innocent Without Freeing the Guilty? Thoughts on Innocence Reforms that Avoid Harmful Trade-Offs*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 264.

¹² See *id.* at 275–76.

to endorse all reforms that might protect the innocent, Cassell unflinchingly asks whether reforms that prevent conviction of the innocent will also lead to more acquittals of the guilty.

Although the volume is about DNA exonerations, the contributing authors emphasize that DNA is only one subplot in the broader story about problems with accuracy in the criminal justice system. Keith Findley captures this sentiment well when he states: “DNA was just the start. While it animated the [Innocence] Movement, it no longer fully defines it. It cannot be the future, at least not the whole or even dominant part of the future.”¹³ Other authors are quick to note that the nature of DNA evidence necessarily limits DNA exonerations to particular types of cases,¹⁴ and that the increasing availability of DNA tests for law enforcement is likely to decrease the number of those exonerations going forward.¹⁵ Indeed, a major premise of the book is that we must distill various lessons from DNA exonerations in order to improve the system for all cases.¹⁶ DNA exonerations exposed not simply the limits of former forensic testing, but also a series of other investigative shortcomings and systemic problems that contributed to wrongful convictions. Until those other shortcomings and problems are remedied, the criminal justice system will continue to make inaccurate determinations about guilt, and innocent people will continue to be jailed for crimes that they did not commit.

I greatly enjoyed reading suggestions from such a diverse group of well-respected authors about how to improve the system based on the lessons we have learned from DNA exonerations. Unsurprisingly, different authors offer different solutions. Some suggest that the exonerations may have undermined the constitutionality of capital punishment.¹⁷ Others advocate expunging convictions from the Jim Crow South that were doubtlessly infected by racial bias.¹⁸ Others see DNA exonerations as an opportunity to reform other areas of the law, such as

¹³ Keith A. Findley, *Flawed Science and the New Wave of Innocents*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 184, 185.

¹⁴ See, e.g., Garrett, *supra* note 3, at 54 (“[M]ost criminal cases have no DNA to test.”); Leo, *supra* note 10, at 73 (“An estimated 80-90 percent of felony cases do not involve biological evidence.”).

¹⁵ See, e.g., Leo, *supra* note 10, at 73 (“[E]ventually forensic DNA testing will be commonplace across the country prior to trial.”); Medwed, *supra* note 9, at 13 (“DNA testing is now ubiquitous at the front end of criminal cases, weeding out innocent suspects before cases even go to trial.”).

¹⁶ See Medwed, *supra* note 9, at 3 (“[T]his is a book about what we have learned from the use of DNA technology to remedy individual cases and reform the criminal justice system . . .”).

¹⁷ Robert J. Smith, G. Ben Cohen & Zoë Robinson, *What Does Innocence Have to Do With Cruel and Unusual Punishment?*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 159.

¹⁸ Margaret Burnham, *Retrospective Justice in the Age of Innocence: The Hard Case of Rape Executions*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 291.

the law of war¹⁹ or animal rights,²⁰ or as an opportunity for different types of clinical education.²¹

Several chapters offer sensible, targeted reforms. Keith Findley's chapter offers a thoughtful case for targeting arson convictions and other cases involving junk science.²² Adele Bernhard's chapter offers a practical improvement on the legal standard that governs ineffective assistance of counsel claims.²³ Rob Warden's chapter on witness recantations highlights the need to change prosecutorial practices involving perjury charges.²⁴ And the chapter by Sandra Guerra Thompson and Robert Wicoff offers important suggestions on how to respond to systemic criminal justice failures, such as fraud by forensic scientists.²⁵

Despite this collection of thoughtful and practical suggestions for reform, I finished the volume less optimistic about the chances that significant criminal justice reform will occur.²⁶ DNA exonerations and the attention they have received have changed assumptions about the infallibility of the criminal justice system. Although DNA exonerations have changed public opinion about whether innocent defendants are convicted, that change in opinion has not led to a "revolution" in the criminal justice system. Large segments of the public now recognize that innocent defendants are convicted with some regularity,²⁷ but society does not seem willing to do much to avoid convicting more innocents in the future.

¹⁹ Erik Luna, *Innocence at War*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 2, at 379.

²⁰ Justin F. Marceau & Steven M. Wise, *Exonerating the Innocent: Habeas for Nonhuman Animals*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 2, at 334.

²¹ Jacqueline McMurtrie, *A Tale of Two Innocence Clinics: Client Representation and Legislative Advocacy*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 2, at 117.

²² See Findley, *supra* note 133.

²³ Adele Bernhard, *Ineffective Assistance of Counsel and the Innocence Revolution: A Standards-Based Approach*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 2, at 226, 235–40.

²⁴ Rob Warden, *Reacting to Recantations*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 2, at 106.

²⁵ Sandra Guerra Thompson & Robert Wicoff, *Outbreaks of Injustice: Responding to Systemic Irregularities in the Criminal Justice System*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 2, at 314.

²⁶ To be clear, I am less optimistic about significant reforms that will protect the innocent from conviction. There are also other reforms that the criminal justice system should undertake, including reforms that would address racial disparity within the system and disproportionately high levels of incarceration in this country. Those reforms are beyond the scope of this essay.

²⁷ Marvin Zalman, Matthew J. Larson & Brad Smith, *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. REV. 51, 57 (2012) (reporting that a quarter of survey respondents believed that wrongful convictions occurred only "very rarely," while the other three-quarters responded that wrongful convictions occurred either "occasionally" or "frequently").

Stephanie Roberts Hartung illustrates this problem in her chapter on post-conviction procedure.²⁸ Hartung complains that, as compared to improvements that have been made in the pretrial and trial context, very few reforms have occurred in the post-conviction realm.²⁹ But reading through the pretrial and trial reforms she identified,³⁰ one wonders whether Hartung could have set a lower bar. Take eyewitness identification, which has been identified as a leading factor present in cases of wrongful conviction.³¹ Despite widespread recognition of the unreliability of prevailing practices, and despite national guidelines promulgated by the National Institute of Justice in 1999, only ten states have reformed police lineup procedures.³² Interrogation procedures have not fared much better. Despite the prevalence of false confessions resulting from coercive and suggestive interrogation procedures, fewer than twenty states have required law enforcement to videotape interrogations.³³

Hartung is not the only author who highlights how little progress has been made. Adele Bernhard's chapter on defense attorneys also paints a bleak picture.³⁴ As she notes, "the DNA exoneration dataset show[s] that poor defense lawyering is a major factor in the conviction of the innocent."³⁵ Yet despite the increased attention to both wrongful convictions and poor defense lawyering in the wake of the DNA revolution, little has changed. Indigent defense is still shamefully underfunded,³⁶ and the quality of defense representation remains poor.³⁷ And, as Bernhard demonstrates, the courts have continued to apply exactly high standards of review to ineffective assistance claims. So even though judges now know for certain that an ineffective defense attorney can significantly increase the chances of an innocent person being convicted, those judges are still unlikely to grant a new trial to a defendant with a hopelessly bad lawyer.³⁸ As a solution,

²⁸ Stephanie Roberts Hartung, *Post-Conviction Procedure: The Next Frontier in Innocence Reform*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION*, *supra* note 2, at 247.

²⁹ *Id.*

³⁰ *See id.* at 248–50.

³¹ Garrett, *supra* note 3, at 46. *See also* BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 9, 48 (2011) (reporting that 76% of a large dataset of exonerated defendants had been misidentified by eyewitnesses).

³² Hartung, *supra* note 28, at 249. Local law enforcement agencies appear to have made at least some progress, albeit at a slow pace. But Hartung reports that fewer than half of all departments have made any of the reforms suggested by the NIJ. *Id.*

³³ *Id.* at 249–50.

³⁴ *See* Bernhard, *supra* note 23.

³⁵ *Id.* at 226.

³⁶ *See, e.g.*, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 17–18, 38 (2004).

³⁷ *See id.* at 14–17, 39.

³⁸ *See* Bernhard, *supra* note 23, at 231–35 (concluding, after a study of ineffective assistance claims, that "[w]hatever concerns the federal courts may have about wrongly convicting innocent

Bernhard suggests that, rather than trying to craft an ineffective assistance standard that is primarily concerned with preserving flexibility and autonomy for defense counsel, courts should instead adopt a checklist approach to representation.³⁹ That our current ineffective assistance doctrine is incapable of capturing those lawyers whose representation includes a failure to perform “basic tasks”⁴⁰ shows how meaningless our current legal standards are. And it is a sad illustration of the fact that the judiciary has, for decades, failed to demand more from members of the bar.

George Thomas’s chapter on prosecutors does not instill confidence in the other side of the adversarial system. Thomas conducted a study of the impact of prosecutorial errors on wrongful convictions.⁴¹ He found many cases of “obvious prosecutorial overreaching,” but he also found plenty of cases involving “routine mistakes that condemn innocent defendants to years in prison.”⁴² One innocent defendant spent 15 years in prison because the state could not keep track of evidence.⁴³ Thomas suggests that these latter cases were more depressing than the cases of affirmative prosecutorial conduct.⁴⁴ I agree.

These examples of incompetence are so disheartening because they expose the negligence and incompetence that many of us suspect is all too common in the criminal justice system. No one thinks that such incompetence is acceptable. And yet, the courts have repeatedly excused such incompetence rather than creating incentives for law enforcement to hold themselves to higher standards.⁴⁵ Incompetence, whether systemic or occasional, will obviously undermine the criminal justice system’s ability to accurately sort the guilty from the innocent.

people, those concerns are not prompting more federal reversals of state convictions for state courts’ misapplication of the Sixth Amendment right to effective assistance of counsel”).

³⁹ *Id.* at 235–40.

⁴⁰ *Id.* at 236, 239.

⁴¹ *See* Thomas, *supra* note 4.

⁴² *Id.* at 213.

⁴³ The defendant spent ten years in prison before persuading a court that a DNA test was necessary; then he spent another fifteen years in prison waiting for the sheriff to find the evidence. *Id.*

⁴⁴ “I should warn that reading these summaries [of a random sample of cases from the Exoneration Registry database] is a depressing project. It’s not just, or maybe not especially, the cases of overreaching that are depressing but the kind of routine mistakes that condemn innocent defendants to years in prison.” *Id.*

⁴⁵ The Court has declined to create incentives for police officers to know the content of the criminal law, *see* *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (holding that the Fourth Amendment does not forbid seizures based on a police officer’s mistaken understanding of the law), incentives to maintain accurate warrants database, *see* *Herring v. United States*, 555 U.S. 135, 144 (2009) (refusing to exclude evidence obtained as a result of an arrest based on an invalid warrant that had not been removed from a law enforcement database), or incentives for prosecutors to train their attorneys on what evidence disclosures are constitutionally required, *see* *Connick v. Thompson*, 563 U.S. 51, 54 (2011) (holding that prior, unrelated *Brady* violations did not create a duty for elected district attorney to conduct further training of line prosecutors).

Without more resources and better incentives, such incompetence is likely to continue.

Paul Cassell's chapter on tradeoffs also highlights the pressing need for more resources. As he notes, the "root cause of wrongful convictions is almost certainly insufficient resources devoted to the criminal justice system."⁴⁶ But the chances of more resources being devoted to the criminal justice system—especially on the front end, rather than toward corrections—are, as Cassell notes, quite slim.⁴⁷

Cassell makes a strong case that, in a system with severely constrained resources, vindicating constitutional rights comes at the expense of protecting the innocent from conviction.⁴⁸ Defense attorneys with limited time and resources will prioritize a suppression motion above a rigorous factual investigation, and legislatures eager to stem the tide of constitutional litigation will limit post-conviction review that could free the innocent. Cassell thus argues that the system's limited resources should be focused towards discovering and vindicating claims of factual innocence. Specifically, he suggests shifting resources away from litigating Fourth Amendment exclusionary claims, *Miranda* claims, and post-conviction claims of a purely legal nature.⁴⁹ All of these claims involve vindicating defendants' constitutional rights rather than improving accuracy.

Especially in a volume devoted to DNA exonerations, Cassell's decision to prioritize the innocent seems intuitively correct. But the nature of this choice should not be sugar-coated: it trades rights and values ordinarily associated with justice in order to have more resources to devote to the pursuit of truth. Can such a system legitimately call itself a criminal *justice* system?

One reason that Cassell's prioritization of innocence over constitutional rights seems correct is that our criminal justice system exists in order to sort the guilty from the innocent. But this foundational premise—that the system exists to sort the innocent from the guilty—takes a serious beating in the chapter by Alexandra Natapoff.⁵⁰ As Natapoff tells us: "[t]he vast bulk of the U.S. criminal system is not engaged in a quest for accuracy based on evidence in the first instance. Instead, it is engaged in bargaining. The plea bargaining process has turned evidence and accuracy into commodities that are traded and negotiated"⁵¹ Natapoff's frank discussion is not simply a commentary on plea bargaining or on the limits of forensic evidence. It is a commentary on the modern criminal justice system. To

⁴⁶ Cassell, *supra* note 11, at 273.

⁴⁷ *Id.* at 274.

⁴⁸ *Id.* at 273–74.

⁴⁹ *Id.* at 272–77. Cassell also suggests that defense counsel attempt to ascertain which of their clients are actually innocent, and to focus their efforts on those clients. *Id.* at 277–80. This suggestion also prioritizes innocence over constitutional rights, as it would decrease the assistance of counsel for the guilty in order to provide more assistance to the innocent.

⁵⁰ See Natapoff, *supra* note 6.

⁵¹ *Id.* at 86.

understand this commentary, it is important to take a step back and consider how plea bargaining operates.

Plea bargaining allows the state to impose punishment without having to incur the time and expense associated with trial. The system works well for guilty defendants who would likely be convicted at trial. Those defendants receive a shorter sentence in return for waiving their right to a trial. And the system has ensured that most guilty defendants will gladly plead rather than proceed to trial. Legislatures routinely increase the punishment associated with conviction at trial so that prosecutors have leverage to induce guilty pleas.⁵² Indeed, legislatures often enact criminal statutes based on an explicit assumption that the parties will plea bargain. For example, in the recent debates over whether to lessen mandatory minimum sentences for drug offenders, reform opponents argued that it was necessary to maintain current penalties, not because they represented appropriate punishments, but rather so that prosecutors could use those penalties as leverage to obtain guilty pleas.⁵³ This arrangement has proven quite effective. Currently, nearly ninety-five percent of convictions are the result of guilty pleas, rather than trials.⁵⁴

But the quest for efficiency in the modern criminal justice system does not target only the guilty defendants. Innocent defendants face the same harsh laws and the same plea bargaining dynamics. Imagine, for example, an innocent defendant who has been indicted for committing a crime that carries a penalty of five years imprisonment. Prosecutors do not simply indict random people, so there is at least some evidence suggesting that the defendant committed the crime. Unless she can produce enough evidence of her innocence to convince the prosecutor to drop the charges, a defendant must choose whether to proceed to trial or accept a plea bargain. The rational decision will depend on the chances that she

⁵² See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1401–02 (2003).

⁵³ Senator Chuck Grassley opposed legislation that would have reduced 20-year, 10-year, and five-year mandatory minimums for drug offenses to 10 years, five years, and two years, respectively. He justified his opposition, in part, on the fact that prosecutors were not seeking those penalties in all cases, and so the sentences were, on average, appropriate. He noted that:

[J]ust under half of all drug courier offenders were subject to mandatory minimum sentences, but under 10 percent were subject to mandatory minimum sentences at the time of their sentencing.

...

That is an intended goal of current Federal sentencing policy, to put pressure on defendants to cooperate in exchange for a lower sentence so evidence against more responsible criminals can be attained. As a result, even for drug couriers the average sentence is 39 months. That seems to be an appropriate level.

161 CONG. REC. S963 (daily ed. Feb. 12, 2015) (statement of Sen. Grassley).

⁵⁴ *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17, 450 tbl.5.46 (31st ed. 2005)) (“Pleas account for nearly 95% of all criminal convictions.”).

will be convicted and the bargain that the prosecutor is offering. If she estimates that she has an 80% chance of acquittal at trial, she should accept any plea bargain that offers her less than one year in prison.⁵⁵

To be clear, Natapoff's contribution here is not to identify the prevalence of plea bargaining or the values that underlie it. The centrality of plea bargaining is well recognized by both criminal justice actors⁵⁶ and those who study the system.⁵⁷ Instead, Natapoff's major contribution is her juxtaposition of plea bargaining with DNA exonerations. That juxtaposition left me pondering whether the very concept of exonerations is out of place in the modern criminal justice system long after I finished reading the volume.

Natapoff's juxtaposition of plea bargaining with DNA exonerations highlights the false promise of reforming the system in light of the lessons learned from DNA exonerations. DNA exonerations captured the attention of the public because they demonstrate "the American criminal justice system's inability to perform its most basic function—separating the innocent from the guilty."⁵⁸ But Natapoff's chapter reminds us that we have largely abandoned that basic function of the system. Ours is now a system of plea bargains rather than a system of trials.⁵⁹ Plea bargaining "commodifies and trades away accuracy" for efficiency.⁶⁰ Plea bargaining puts a price tag on sorting the innocent from the guilty, and it makes that price too high for most defendants. The implicit message of plea bargaining is that, because trials are expensive, we should avoid them, even at the cost of convicting innocent defendants.

⁵⁵ The rational actor model tells us that the defendant would want to accept this bargain because it represents the expected punishment—the "product of the probability of conviction and the anticipated sentence upon conviction at trial." Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 714 (1988). For more on plea bargaining and the rational actor model, see Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163 (2007) (describing the rational actor paradigm in plea bargaining and explaining why it may not capture the reality of the negotiation between prosecutor and defense counsel).

⁵⁶ See, e.g., *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (stating that "plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system."); *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice.").

⁵⁷ See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

⁵⁸ Leo, *supra* note 10, at 59.

⁵⁹ See Bibas, *supra* note 57, at 1138 ("Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.").

⁶⁰ Natapoff, *supra* note 6, at 87.

In contrast to the message of plea bargaining, the message in the wake of the DNA exonerations is that we may be able to improve the ability of our system to sort the innocent from the guilty. Implicit in this hope of improving our ability to sort the innocent from the guilty is “the notion that our criminal system is primarily committed to accuracy in the first instance.”⁶¹ But the prevalence of plea bargaining and the dynamics that have made trial an unaffordable luxury for even innocent defendants tell us the opposite. They show that our desire for efficiency has supplanted the original goal of the criminal justice system—to punish the guilty while protecting the innocent.⁶²

Natapoff’s critique of the criminal justice system and the ability of DNA exonerations to improve the system is not limited to plea bargaining. She also points to misdemeanor prosecutions—which vastly outnumber felony prosecutions⁶³—as further proof that our system cares more about shuffling people through the system than using the system to seek the truth.⁶⁴ The misdemeanor system regularly uses pretrial detention to coerce pleas on charges that would have resulted in little or no jail time had the defendant been convicted at trial.⁶⁵ And when defense attorneys do attempt to litigate in misdemeanor courts, some judges are openly hostile to their efforts. Natapoff recounts the experience of Eve Brensike Primus, a defense attorney turned law professor, who was told by a judge

⁶¹ *Id.* at 97.

⁶² I am, of course, hardly the first to make these observations about efficiency and market forces. Stephanos Bibas, for example, has criticized the free market defense of plea bargaining offered by many academics, noting that “[n]ot all of ethics boils down to weighing consequences and maximizing the actors’ preferences.” STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 63 (2012). Darryl Brown demonstrates that “the success of market mechanisms and market-inspired norms” extends beyond plea bargaining to other areas of criminal procedure and that, although “the model of markets” was “intended to limit the state,” it has instead allowed “state enforcement capacity [to] thrive[.]” DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 63, 66 (2016). As to the efficiency value, many have noted that prioritizing efficiency in the criminal justice system is both troubling and pernicious. *See, e.g.*, BIBAS, *supra*, at 65 (“A system less obsessed with efficiency would slow down to take a closer look at these cases [because] the inefficient safeguards of trial might catch some of these injustices.”).

⁶³ *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012) (noting that “[a]pproximately one million felony convictions are entered in the U.S. each year,” while “[a]n estimated ten million misdemeanor cases are filed annually . . .”).

⁶⁴ Natapoff, *supra* note 6, at 94–96. *See also* Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 258 (2015) (“[M]any lower courts rush indigent defendants through in bulk, earning nicknames such as cattle herding, assembly-line processing, and McJustice.”).

⁶⁵ Natapoff, *supra* note 6, at 95. *See also* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 747, 771 (2017) (reporting that misdemeanor defendants who are detained pretrial are more likely to be convicted and more likely to receive sentences of jail time; “17% of the detained misdemeanor defendants . . . who pleaded guilty would not have been convicted at all had they been released pretrial”; detained defendants “have essentially accumulated credits toward a final sentence of jail as a result of their detention and are therefore more likely to accede to and receive sentences of imprisonment”).

to save her substantive arguments for appeal.⁶⁶ Natapoff also recounts how misdemeanor defendants have, on numerous occasions, been convicted for innocuous conduct that appellate courts had previously held not to be illegal.⁶⁷

Whatever modest reforms DNA exonerations have prompted are nowhere to be seen in either plea bargaining dynamics or the misdemeanor system. Nor is there much hope that the exonerations will change these systems in the future. DNA is simply not an issue in the vast majority of cases.⁶⁸ And even if DNA exonerations were to change investigative techniques, such as eyewitness identifications and interrogation procedures, those techniques often are not employed in misdemeanor cases. Loitering, trespassing, and other common misdemeanors rely only on police observation, rather than investigative techniques.⁶⁹

DNA testing is unlikely to have much effect on plea bargaining either. Some (though notably not all) states permit defendants who pleaded guilty to obtain post-conviction DNA testing.⁷⁰ But the essentially unlimited bargaining power given to prosecutors allows them to easily circumvent these post-conviction safeguards. Prosecutors can condition a plea bargain on a defendant's waiver of her right to DNA testing,⁷¹ and they can also require defendants to waive any rights to appeal or to otherwise challenge their convictions.⁷² There are plenty of examples of innocent defendants who have pleaded guilty rather than wait for DNA testing because prosecutors refused to keep the plea bargain offer open until the tests came back and defendants knew the results might be inconclusive.⁷³

Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent is an ambitious and important book. It not only provides a thorough and nuanced overview of DNA exonerations, it also challenges the reader to

⁶⁶ Natapoff, *supra* note 6, at 95 (citing Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 81 (2012)).

⁶⁷ Natapoff, *supra* note 6, at 95–96.

⁶⁸ See *supra* note 14 and accompanying text.

⁶⁹ “[U]nlike serious offenses of burglary, rape or homicide, the ‘evidence’ of a misdemeanor defendant’s guilt will often be no more than a police officer’s assertion of loitering, trespassing, speeding, handing something to someone else, acting as a nuisance, or other behavior.” Natapoff, *supra* note 63, at 1346.

⁷⁰ See Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 955 n.14 (2012) (“Approximately fifteen statutes currently deny DNA testing to defendants who pleaded guilty.”).

⁷¹ See *id.* at 958 (documenting DNA waivers and noting that, if challenged, courts are likely to uphold such waivers).

⁷² See Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 92 (2015) (conducted study establishing that “a significant number of prosecutors seek waivers of all statutory and constitutional claims regardless of whether such violations occurred pre-trial, during the entry of a guilty plea, at the sentencing hearing, or thereafter”).

⁷³ See, e.g., *Buffey v. Ballard*, 236 W. Va. 509 (2015).

consider whether real criminal justice reform is possible. While some chapters take an optimistic approach to the question of reform, others paint a much more troubling picture. To be clear, the pessimistic messages in these chapters by Hartung, Bernhard, Thomas, Cassell, and Natapoff are a reason to read this volume, not a reason to avoid it. Those who wish to educate themselves about the criminal justice system will invariably learn things that are discomforting. Our system is far from perfect, and there are many reasons that reform has repeatedly stalled.

Indeed, that reform remains elusive may be one of the most important lessons that we can learn from DNA exonerations. Those exonerations upended the conventional wisdom about the accuracy of the criminal justice system, proving that our system has repeatedly failed to sort the innocent from the guilty, and highlighting various features of the current system that almost certainly impair accurate determinations of guilt in cases without DNA evidence. But changing public opinion about the fallibility of the criminal justice system has not been enough to start a true “revolution.” There will be no revolution until (and unless) we demand investigative changes from law enforcement, ensure effective assistance from defense attorneys, refuse to tolerate incompetence and inattention from prosecutors, devote more resources to criminal justice, and renounce efficiency as the driving value in criminal cases.